

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Apr 26, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RAFAEL L.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO: 2:20-CV-00093-FVS

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 13, 15. This matter was submitted for consideration without oral argument. Plaintiff is represented by Attorney Jeffrey Schwab. Defendant is represented by Special Assistant United States Attorney Stephen Dmetruk. The Court has reviewed the administrative record, the parties' completed briefing, and is fully informed. For the reasons discussed below, the Court **GRANTS** Plaintiff's Motion for Summary Judgment, ECF No. 13, and **DENIES** Defendant's Motion for Summary Judgment, ECF No. 15.

JURISDICTION

Plaintiff Rafael L.¹ protectively filed an application for Supplemental Security Income (SSI) on May 30, 2017, Tr. 56, alleging an onset date of May 17, 2016 due to anxiety, obsessive compulsive disorder (OCD), posttraumatic stress disorder (PTSD), a broken finger on the right hand, seizure disorder, degenerative disc disease, degenerative joint disease, and a traumatic brain injury (TBI), Tr. 148. Plaintiff's application was denied initially, Tr. 83-86, and upon reconsideration, Tr. 90-92. A hearing before Administrative Law Judge Raymond L. Souza ("ALJ") was conducted on December 18, 2018. Tr. 28-55. Plaintiff was represented by counsel and testified at the hearing. *Id.* The ALJ also took the testimony of vocational expert Carrie Whitlow. *Id.* The ALJ denied SSI benefits on January 30, 2019. Tr. 15-23. The Appeals Council denied review on January 15, 2020. Tr. 1-5. Plaintiff requested judicial review of the ALJ decision by this Court on March 10, 2020. ECF No. 1. The ALJ's January 30, 2019 decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §§ 405(g), 1383(c).

BACKGROUND

The facts of the case are set forth in the administrative hearing and

¹In the interest of protecting Plaintiff's privacy, the Court will use Plaintiff's first name and last initial, and, subsequently, Plaintiff's first name only, throughout this decision.

1 transcripts, the ALJ's decision, and the briefs of Plaintiff and the Commissioner.

2 Only the most pertinent facts are summarized here.

3 Plaintiff was 36 years old at the date of application. Tr. 147. Plaintiff
4 completed his GED in 2001. Tr. 197. Plaintiff has never had formal employment
5 because he was incarcerated from May 13, 1996 to 2016. Tr. 196-97, 160, 261.

6 STANDARD OF REVIEW

7 A district court's review of a final decision of the Commissioner of Social
8 Security is governed by 42 U.S.C. §§ 405(g), 1383(c). The scope of review under
9 § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not
10 supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698
11 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence
12 that a reasonable mind might accept as adequate to support a conclusion." *Id.* at
13 1159 (quotation and citation omitted). Stated differently, substantial evidence
14 equates to "more than a mere scintilla[,] but less than a preponderance." *Id.*
15 (quotation and citation omitted). In determining whether the standard has been
16 satisfied, a reviewing court must consider the entire record as a whole rather than
17 searching for supporting evidence in isolation. *Id.*

18 In reviewing a denial of benefits, a district court may not substitute its
19 judgment for that of the Commissioner. "The court will uphold the ALJ's
20 conclusion when the evidence is susceptible to more than one rational
21 interpretation." *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008).

1 Further, a district court will not reverse an ALJ's decision on account of an error
2 that is harmless. *Id.* An error is harmless where it is "inconsequential to the
3 [ALJ's] ultimate nondisability determination." *Id.* (quotation and citation omitted).
4 The party appealing the ALJ's decision generally bears the burden of establishing
5 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered "disabled" within
8 the meaning of the Social Security Act. First, the claimant must be "unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months." 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant's impairment must be
13 "of such severity that he is not only unable to do his previous work[,] but cannot,
14 considering his age, education, and work experience, engage in any other kind of
15 substantial gainful work which exists in the national economy." 42 U.S.C. §
16 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
19 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's work
20 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in "substantial
21 gainful activity," the Commissioner must find that the claimant is not disabled. 20

1 C.F.R. § 416.920(b).

2 If the claimant is not engaged in substantial gainful activity, the analysis
3 proceeds to step two. At this step, the Commissioner considers the severity of the
4 claimant's impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
5 "any impairment or combination of impairments which significantly limits [his or
6 her] physical or mental ability to do basic work activities," the analysis proceeds to
7 step three. 20 C.F.R. § 416.920(c). If the claimant's impairment does not satisfy
8 this severity threshold, however, the Commissioner must find that the claimant is
9 not disabled. 20 C.F.R. § 416.920(c).

10 At step three, the Commissioner compares the claimant's impairment to
11 severe impairments recognized by the Commissioner to be so severe as to preclude
12 a person from engaging in substantial gainful activity. 20 C.F.R. §
13 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
14 enumerated impairments, the Commissioner must find the claimant disabled and
15 award benefits. 20 C.F.R. § 416.920(d).

16 If the severity of the claimant's impairment does not meet or exceed the
17 severity of the enumerated impairments, the Commissioner must pause to assess
18 the claimant's "residual functional capacity." Residual functional capacity (RFC),
19 defined generally as the claimant's ability to perform physical and mental work
20 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
21 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

1 At step four, the Commissioner considers whether, in view of the claimant's
2 RFC, the claimant is capable of performing work that he or she has performed in
3 the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
4 capable of performing past relevant work, the Commissioner must find that the
5 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
6 performing such work, the analysis proceeds to step five.

7 At step five, the Commissioner considers whether, in view of the claimant's
8 RFC, the claimant is capable of performing other work in the national economy.
9 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
10 must also consider vocational factors such as the claimant's age, education and
11 past work experience. 20 C.F.R. § 416.920(a)(4)(v). If the claimant is capable of
12 adjusting to other work, the Commissioner must find that the claimant is not
13 disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to
14 other work, analysis concludes with a finding that the claimant is disabled and is
15 therefore entitled to benefits. 20 C.F.R. § 416.920(g)(1).

16 The claimant bears the burden of proof at steps one through four. *Tackett v.*
17 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five,
18 the burden shifts to the Commissioner to establish that (1) the claimant is capable
19 of performing other work; and (2) such work "exists in significant numbers in the
20 national economy." 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386,
21 389 (9th Cir. 2012).

ALJ'S FINDINGS

At step one, the ALJ found that Plaintiff had not engaged in substantial gainful activity since the application date, May 30, 2017. Tr. 17. At step two, the ALJ found that Plaintiff had the following severe impairments: degenerative disc disease; seizure disorder; PTSD; anxiety disorder; and OCD. Tr. 17. At step three, the ALJ found that Plaintiff did not have an impairment or combination of impairments that meet or medically equaled the severity of a listed impairment. Tr. 17. The ALJ then found that Plaintiff had the RFC to perform light work as defined in 20 CFR § 416.967(b) with the following limitations:

no climbing ladders, ropes, or scaffolds. He can occasionally climb ramps and stairs, stoop, kneel, crouch, and crawl. The claimant must avoid all exposure to hazards (including moving machinery and unprotected heights). The claimant is limited to simple, routine work with an SVP 1 and 2. The claimant can have no more than occasional interaction with the general public, coworkers, and supervisors.

Tr. 19.

At step four, the ALJ found that Plaintiff had no past relevant work. Tr. 22.

At step five, the ALJ found that considering Plaintiff's age, education, work experience, and RFC, there were other jobs that exist in significant numbers in the national economy that Plaintiff could perform, including: production assembler; inspector and hand packager; and garment folder. Tr. 23. On that basis, the ALJ concluded that Plaintiff was not under a disability, as defined in the Social Security Act, from May 30, 2017, the date of application, through the date of his decision.

Tr. 23.

ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying him SSI under Title XVI of the Social Security Act. ECF No. 13. Plaintiff raises the following issues for this Court's review:

1. Whether the ALJ erred in evaluating the medical opinion evidence;
2. Whether the ALJ properly considered Plaintiff's symptom statements; and
3. Whether the ALJ made a proper step five determination.

DISCUSSION

1. Medical Opinion Evidence

Plaintiff challenges the ALJ's finding that the April 20, 2017 opinion of R.A. Cline, Psy.D. was persuasive. ECF No. 13 at 8-11.

For claims filed on or after March 27, 2017, new regulations apply that change the framework for how an ALJ must weigh medical opinion evidence. *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL 168819, 82 Fed. Reg. 5844 (Jan. 18, 2017); 20 C.F.R. § 416.920c. The new regulations provide the ALJ will no longer give any specific evidentiary weight to medical opinions or prior administrative medical findings, including those from treating medical sources. 20 C.F.R. § 416.920c(a). Instead, the ALJ will consider the persuasiveness of each medical opinion and prior administrative medical finding, regardless of whether the medical source is an Acceptable Medical Source. 20 C.F.R. § 416.920c(c). The ALJ is required to consider multiple factors,

1 including supportability, consistency, the source's relationship with the claimant,
2 any specialization of the source, and other factors (such as the source's familiarity
3 with other evidence in the file or an understanding of Social Security's disability
4 program). *Id.* The regulations make clear that the supportability and consistency
5 of the opinion are the most important factors, and the ALJ must articulate how she
6 considered those factors in determining the persuasiveness of each medical opinion
7 or prior administrative medical finding. 20 C.F.R. § 416.920c(b). The ALJ may
8 explain how he considered the other factors, but is not required to except in cases
9 where two or more opinions are equally well-supported and consistent with the
10 record. *Id.*

11 Supportability and consistency are further explained in the regulations:

12 (1) *Supportability.* The more relevant the objective medical evidence
13 and supporting explanations presented by a medical source are to
14 support his or her medical opinion(s) or prior administrative medical
15 finding(s), the more persuasive the medical opinions or prior
16 administrative medical finding(s) will be.

17 (2) *Consistency.* The more consistent a medical opinion(s) or prior
18 administrative medical finding(s) is with the evidence from other
19 medical sources and nonmedical sources in the claim, the more
20 persuasive the medical opinion(s) or prior administrative medical
21 finding(s) will be.

20 C.F.R. § 416.920c(c).

19 On May 26, 2016, Dr. Cline evaluated Plaintiff and later completed a
20 Psychological/Psychiatric Evaluation form for the Washington Department of
21 Social and Health Services (DSHS). Tr. 260-64. He diagnosed Plaintiff with

1 OCD, panic disorder, and PTSD. Tr. 262. Plaintiff completed a Rey 15-Item
2 Memory Test (RMT) with a score of 10 indicating an average level of effort and
3 cooperation with the task and “meets basic criteria for non-malingering at this
4 time.” Tr. 261. Dr. Cline opined that Plaintiff had a marked limitation in the
5 abilities to communicate and perform effectively in a work setting, to maintain
6 appropriate behavior in a work setting, and to complete a normal workday and
7 work week without interruptions from psychologically based symptoms. Tr. 263.
8 He also opined that Plaintiff had a moderate limitation in five additional areas of
9 basic work activity. Tr. 262-63.

10 On April 20, 2017, Plaintiff completed a second evaluation of Plaintiff and
11 later completed a Psychological/Psychiatric Evaluation form for DSHS. Tr. 265-
12 69. Plaintiff completed a RMT with a score of 3, indicating “a poor level of effort
13 and cooperation with the task and does not provide evidence of non-malingering.”
14 Tr. 265. Therefore, Plaintiff was given a Test of Memory Malingering (TOMM)
15 with scores of 19 and 25 that “do not provide evidence of non-malingering.” *Id.*
16 Plaintiff was then diagnosed as malingering, and Dr. Cline stated that “[c]laimant
17 has previously been diagnosed with PTSD, OCD and panic disorder by this writer
18 but due to the presence of significant malingering today, these diagnoses are
19 suspended at this time.” Tr. 265. Dr. Cline made the following statement
20 regarding the finding of malingering:

21 //

1 There are multiple reasons that claimants malingering, but when a claimant
2 is found to be malingering it is usually for one of two reasons, either to
3 look better or worse than they truly are. In this context claimants
4 typically malingering in order to appear worse off than they truly are and
5 thus access benefits of some kind. As their malingering indicates a
6 level of untruthfulness severity ratings cannot be made and symptoms
7 cannot be described accurately on the basis of their self-report and will
8 not be provided in the assessment. Any diagnoses that are provided
9 aside from malingering should be viewed as provisional. Malingering
10 is not a static state, and the level of malingering will wax and wane with
11 the person's motivation to access benefits. Thus re-evaluation for
12 malingering is valid, generally after about 6 months. Additionally, it
13 should be noted that TOMM is highly insensitive to organic brain
14 syndrome, meaning that those with significant TBI or legitimate
15 cognitive problems typically pass this assessment when they are not
16 malingering.

17 Tr. 266.

18 The ALJ found Dr. Cline's 2017 opinion was "persuasive and supported by
19 the test administered by Dr. Cline documenting the claimant's exaggeration of
20 symptoms." Tr. 21. The ALJ further characterized the 2017 evaluation as Dr.
21 Cline "rescinded the prior diagnoses of OCD, panic disorder, and PTSD." Tr. 21.
Plaintiff challenges the ALJ's finding that the opinion was persuasive because the
finding of malingering was not supported by substantial evidence. ECF No. 13 at
11.

At the 2017 evaluation, Plaintiff reported to Dr. Cline that he had a history
of a head injury that resulted in a loss of consciousness for 36 hours and a history
of a seizure disorder beginning in 2016. Tr. 265. Following a third seizure,
Plaintiff was sent for an MRI of the brain in 2016. Tr. 319-21. The MRI was
performed on December 14, 2016, and showed that "[a] prominent area of the

1 increased T2 and FLAIR signal involves the deep and subcortical white matter of
2 the right frontal lobe.” Tr. 399. The radiologist’s impression was that there was an
3 “[a]rea of encephalomalacia involving the right frontal lobe. This may relate to an
4 old insult.” *Id.* Dr. Packer, who reviewed Dr. Cline’s records and the MRI stated
5 that “[t]he 4/20/17 Psych assessment of malingering must be very much discounted
6 in view of the evident post-TBI findings on brain MRI, with seizure focus and
7 encephalomalacia in the [right] frontal lobe.” Tr. 271. Dr. Packer stated a second
8 time that “psych statements regarding malingering are superseded by objective
9 findings on MRI brain.” *Id.*

10 At the time of his 2017 evaluation and opinion, Dr. Cline did not review any
11 records other than his previous 2016 Psychological/Psychiatric Evaluation form for
12 DSHS. Tr. 265 (“Records reviewed: Previous assessment by this writing dated
13 5/26/16 with diagnoses of PTSD, OCT, and panic disorder.”). Plaintiff informed
14 him of his head injury and the recent onset of seizure activity. *Id.* Dr. Cline
15 appeared aware that such an injury may result in the TOMM results being
16 inaccurate as he included the statement that the test is “highly insensitive to
17 organic brain syndromes, meaning those with significant TBI or legitimate
18 cognitive problems typically pass this assessment when they are not malingering,”
19 and cited to a medical periodical supporting this assertion. Tr. 266. Therefore, the
20 introduction of the MRI into the record caused a reviewing provider, Dr. Packer, to
21 reject the finding of malingering. Tr. 270. Therefore, the record, as it currently

1 stands, is ambiguous regarding malingering.

2 “In Social Security cases the ALJ has a special duty to fully and fairly
3 develop the record and to assure that the claimant’s interests are considered.”
4 *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996). “An ALJ’s duty to develop
5 the record . . . is triggered only when there is ambiguous evidence or when the
6 record is inadequate to allow for proper evaluation of the evidence.” *Mayes v.*
7 *Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001); *Webb v. Barnhart*, 433 F.3d 683,
8 687 (9th Cir. 2005) (“The ALJ’s duty to supplement a claimant’s record is
9 triggered by ambiguous evidence, the ALJ’s own finding that the record is
10 inadequate[,] or the ALJ’s reliance on an expert’s conclusion that the evidence is
11 ambiguous.”). The ALJ failed to address and resolve this ambiguity, which was an
12 error.

13 This ambiguity could have been properly addressed by the ALJ calling a
14 medical expert to testify at the hearing regarding Dr. Cline’s finding of
15 malingering in April of 2017 and the MRI showing the TBI in December of 2016.
16 The case is remanded for the ALJ to properly address this ambiguity and call a
17 medical expert to testify at a supplemental hearing. At that time, the medical
18 expert can also provide testimony regarding Dr. Cline’s language suspending a
19 diagnosis due to malingering compared to the ALJ’s language rescinding a
20 diagnosis due to malingering as brought forth in the parties’ briefings. If
21 additional testing is necessary to properly develop the record, the ALJ will send

1 Plaintiff for additional consultative evaluations to perform the necessary testing.

2 **2. Plaintiff's Symptom Statements**

3 Plaintiff argues that the ALJ erred in his treatment of his symptom
4 statements. ECF No. 13 at 11-13.

5 An ALJ engages in a two-step analysis when evaluating a claimant's
6 testimony regarding subjective pain or symptoms. "First, the ALJ must determine
7 whether the claimant has presented objective medical evidence of an underlying
8 impairment which could reasonably be expected to produce the pain or other
9 symptoms alleged." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). "The
10 claimant is not required to show that his impairment could reasonably be expected
11 to cause the severity of the symptom he has alleged; he need only show that it
12 could reasonably have caused some degree of the symptom." *Id.*

13 Second, "[i]f the claimant meets the first test and there is no evidence of
14 malingering, the ALJ can only reject the claimant's testimony about the severity of
15 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the
16 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal
17 citations and quotations omitted).

18 The issue of malingering is to be addressed further in remand proceedings.
19 Therefore, Plaintiff's symptom statements will need to be addressed further once
20 the issue of malingering is resolved.

21 ///

1 **3. Step Five**

2 Plaintiff's step five argument is derivative of his challenge to the ALJ's
3 finding of malingering. ECF No. 13 at 18. Therefore, the ALJ will readdress step
4 five upon remand.

5 **CONCLUSION**

6 The decision whether to remand for further proceedings or reverse and
7 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
8 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
9 where "no useful purpose would be served by further administrative proceedings,
10 or where the record has been thoroughly developed," *Varney v. Sec'y of Health &*
11 *Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by
12 remand would be "unduly burdensome[.]" *Terry v. Sullivan*, 903 F.2d 1273, 1280
13 (9th Cir. 1990); *see also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)
14 (noting that a district court may abuse its discretion not to remand for benefits
15 when all of these conditions are met). This policy is based on the "need to
16 expedite disability claims." *Varney*, 859 F.2d at 1401. But where there are
17 outstanding issues that must be resolved before a determination can be made, and it
18 is not clear from the record that the ALJ would be required to find a claimant
19 disabled if all the evidence were properly evaluated, remand is appropriate. *See*
20 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211
21 F.3d 1172, 1179-80 (9th Cir. 2000).

1 Here, Plaintiff did not request an immediate award of benefits, ECF No. 13
2 at 16-17, and further administrative proceedings are necessary for the ALJ to
3 resolve the ambiguity regarding evidence of Plaintiff malingering compared to the
4 evidence of Plaintiff's TBI. *See Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d
5 1090, 1103-04 (9th Cir. 2014) (remand for benefits is not appropriate when further
6 administrative proceedings would serve a useful purpose). Therefore, the Court
7 remands this case for further proceedings consistent with this Order.

8 On remand, the ALJ will supplement the record with any outstanding
9 evidence, call a medical expert to testify at a remand hearing to resolve the issue of
10 Plaintiff's malingering testing and his TBI, and send Plaintiff for an tests that are
11 required to properly develop the record. Additionally, the ALJ will readdress
12 Plaintiff's symptom statements and make a new step five determination. The ALJ
13 will call a vocational expert to testify in making the new step five determination.

14 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 15 1. Plaintiff's Motion for Summary Judgment, ECF No. 13, is **GRANTED**,
16 and the matter is remanded for further proceedings consistent with this
17 Order.

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2. Defendant's Motion for Summary Judgment, ECF No. 15 is **DENIED**.

The District Court Executive is hereby directed to enter this Order and provide copies to counsel, enter judgment in favor of the Plaintiff, and **CLOSE** the file.

DATED this 26th day of April 2021.



A handwritten signature in blue ink that reads "Stanley A. Bastian". The signature is fluid and cursive, with a horizontal line drawn underneath it.

Stanley A. Bastian
Chief United States District Judge